

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)	
FOR BENEFICIAL WATER USE PERMIT)	FINAL ORDER
77304-s40C BY DAVE AND PATRICIA A.)	
ROBERTS)	

* * * * *

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written exceptions were received. Therefore, having given the matter full consideration, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the March 24, 1992, Proposal for Decision, and incorporates them herein by reference.

WHEREFORE, based upon the record herein, the Department makes the following:

ORDER

Application for Beneficial Water Use Permit No. 77304-s40C by Dave and Patricia A. Roberts is denied.

NOTICE


The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of the Final Order.

CASE # 77304

FILMED
AUG 28 1992



Dated this 22 day of April, 1992.



Gary Fritz, Administrator
Department of Natural Resources
and Conservation
Water Resources Division
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6605

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record at their address or addresses this 22nd day of April, 1992 as follows:

Dave & Patricia Roberts
P.O. Box 47
Melstone, MT 59054

DeJaegher Ranch
% Thomas DeJaegher
Box 97
Melstone, MT 59054

James F. Christensen
Norma J. Christensen
Box 52
Melstone, MT 59054

Stensvad Inc., Big Rock
Feeders & Big Rock Ranch
% Gale K. Stensvad, Tom Allen
& Keith Stensvad
Box 285
Melstone, MT 59054

Parrott Land & Cattle
% Douglas Parrott
P.O. Box 266
Roundup, MT 59072

Montana Department of Fish,
Wildlife & Parks
% Bob Lane
1420 E. 6th Avenue
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Sam Rodriguez
Sterling Sundheim
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Cindy G. Campbell
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NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

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IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT)
77304-s40C BY DAVE AND PATRICIA A.)
ROBERTS)

PROPOSAL FOR
DECISION

* * * * *

Pursuant to §§ 85-2-121 and 85-2-309, MCA, a hearing was held in the above matter on January 8, 1992, in Roundup, Montana, to determine whether a Beneficial Water Use Permit based on the above Application should be granted to Dave and Patricia A. Roberts under the criteria in § 85-2-311(1) and (4), MCA.

APPEARANCES

Applicants appeared at the hearing by and through Dave Roberts.

Objector Parrott Land & Cattle (Parrott) appeared at the hearing through Douglas Parrott, Partner and immediate past president of the Deadman's Basin Water Users' Association. Henry Bedford, current president of the Deadman's Basin Water Users' Association, appeared as witness in behalf of Objector Parrott. Robert Goffena, area landowner and member of the board of directors of the Deadman's Basin Water Users' Association, appeared in behalf of Objector Parrott.

Objectors James F. and Norma J. Christensen appeared at the hearing through James F. Christensen.

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Objectors Gale Stensvad, Tom Allen, and Keith Stensvad (doing business as Stensvad, Inc., Big Rock Feeders, and Big Rock Ranch) appeared at the hearing through Gale Stensvad.

Objector DeJaegher Ranch appeared at the hearing through Thomas DeJaegher.

Sterling Sundheim, Engineer with the Lewistown Water Resources Division Regional Office of the Department of Natural Resources and Conservation (Department), appeared as Department's staff witness.

Bob Lane, staff legal counsel for Objector Montana Department of Fish, Wildlife and Parks (DFWP), indicated at the pre-hearing telephone conference held on November 13, 1991, that Objector DFWP intended to withdraw their objection based on Applicants' expressed willingness to accept a condition suggested by Objector DFWP in their filed objection. The November 15, 1991, Prehearing Order indicated that if a permit were issued the suggested condition would be placed on it. Objector stated a written withdrawal would be submitted, but one was not received by the Hearing Examiner. Objector DFWP failed to appear at the hearing. The record shows a properly constituted Notice of Hearing was properly served on Objector DFWP on November 15, 1991, by certified mail, return receipt requested. See Mont. Admin. R. 36.12.204(1) (1984). A return receipt was received by the Department with a signature indicating delivery. The Notice of Hearing set the hearing for Wednesday, January 8, 1992, beginning at 9:00 a.m. The Hearing Examiner received no

communication from Objector DFWP prior to the hearing or subsequent to the close of the record.

The Hearing Examiner ruled at the hearing Objector DFWP was in default and that its objection be stricken. That ruling is hereby confirmed. Mont. Admin. R. 36.12.208 (1984).

Beginning at 2:00 p.m. on the day of the hearing, the Hearing Examiner conducted a site visit to the proposed point of diversion and place of use. Also present at the site visit were Sterling Sundheim, and Russ Hoagland, ranch manager for Applicants. The purpose of the site visit was to familiarize the Hearing Examiner with locations related to this Application solely to facilitate his understanding. The offering of evidence or argument was not allowed, and did not occur.

EXHIBITS

No exhibits were submitted at the hearing by any party.

As agreed to at the hearing, Applicants were provided the opportunity to submit information to the Hearing Examiner by January 21, 1992, with copies to all parties, relating to the proposed volume and downward amendment of the place of use. Applicants submitted a one-page letter from Kenneth L. Peterson, Engineer Technician with the Soil Conservation Service, dated January 8, 1992, which was received by the Hearing Examiner on January 14, 1992. No responses or objections to the letter have been received from any of the objectors or the Department. The Peterson letter is admitted into the record.

Prior to the hearing, all parties were given opportunity to review the Department's file on this Application. There were no objections expressed by any party to the admission of the Department's file into the record. Therefore, the Department's file of this Application is a part of the record in its entirety. At the hearing, the Hearing Examiner indicated that notice would be taken of the Department's records of water rights on the Musselshell River, particularly in the area of concern herein. No objections were expressed.

FINDINGS OF FACT

1. Application for Beneficial Water Use Permit No. 77304-s40C was filed with the Department by Applicants on February 21, 1991, at 11:50 a.m. (Department's file)

2. Pertinent portions of the application were published in the Roundup Record-Tribune, a newspaper of general circulation in the area of the proposed source, on April 17, 1991. Additionally, the Department served notice by first-class mail on individuals and public agencies which the Department determined might be interested in or affected by the application. (Department's file)

3. Five timely objections were received by the Department. The principal issue raised by the objections was that no unappropriated water is available in the proposed source of supply. All of the objectors own senior rights to use water from the

Musselshell River,¹ and have rights to divert their water during the proposed period of appropriation. Three of the objectors are downstream from the point of diversion of the proposed appropriation. (Department's file and records)

4. Applicants proposed, on the application form and in the published notice, to appropriate 1,400 gallons per minute up to 300 acre-feet per year of water from the Musselshell River for irrigation of 66.8 acres. The means of diversion would be a pump located in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 34, Township 11 North, Range 31 East, Rosebud County, Montana. The proposed place of use was specifically described as 29.6 acres in the W $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 26, 18.7 acres in the E $\frac{1}{2}$ E $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 27, 2.8 acres in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 34, and 15.7 acres in the W $\frac{1}{2}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 35. The period of appropriation would be April 15 through June 1 and September 1 through October 15 of each year. (Department's file)

5. Since the filing of the Application and the public notices, the area of the proposed place of use has been reduced by a dike that has been built on the northeastern and northern edges of the field. The area has been reduced by 12.5 acres, which leaves 54.3 acres in the place of use. The reduction in acreage is in the two individual parcels of irrigation in Sections 26 and 27; however the amount in each has not been identified. (Peterson letter and testimony of Dave Roberts)

¹ The DFWP initially filed objection, but since their objection has been stricken they are no longer an objector. See Appearances, above.

6. Applicants' stated intent is to only use the proposed appropriation in the early spring, and possibly in the fall, to provide a few extra applications of water as a supplement to the irrigation they presently conduct using water from the Delphia-Melstone Canal.. The proposed appropriation is not intended to provide the sole source of water for irrigation of the place of use. (Testimony of Dave Roberts)

7. Applicants have fifty-five shares in the Delphia-Melstone Canal Company which are used to irrigate the fields that would be the place of use of the proposed appropriation. A share of canal water is two acre-feet per acre. Applicants' stated intent is to continue to use the Delphia-Melstone shares and that the proposed appropriation would only be an early and late season supplement. Details of how this water is used are not a part of the record and were not a part of the Department's review of this proposed appropriation. (Department's file and testimony of Dave Roberts, Sterling Sundheim, and Dale Stensvad)

8. The proposed volume, 300 acre-feet, was developed by Applicant and Ken Peterson of the Soil Conservation Service and based on the needs of the intended crop and area of the place of use, given the soils and type of irrigation system. According to an initial analysis by the Department of the proposed irrigation, 359 acre-feet per year is the maximum amount of water that could be used without waste to irrigate 66.8 acres in a dry year under full system irrigation. This would be 291.59 acre-feet per year for 54.3 acres. Gale Stensvad testified that 3 acre-feet per

acre is adequate irrigation to obtain two crops on his nearby property, which would be 162.9 acre-feet per year for 54.3 acres.

Further analysis was conducted by the Department because the proposal is for less than full service irrigation. The results of the analysis showed that the maximum amount that could be used without waste for the proposed irrigation is 286.4 acre-feet per year. However, this figure and analysis was conducted before the Department knew of Applicants' past use of Delphia-Melstone Canal water on this field, and their intent to continue to use it in the future.

The volume figures identified by Applicants and by the Department's analysis exceed the maximum amount that could be used without waste. Because of unknown factors about how the canal water is used, it is not possible from the record to determine what is the maximum amount of water that could be used without waste under the proposed appropriation. (Department's file and testimony of Sterling Sundheim)

9. Water has been scarce in the Musselshell River for a prolonged period of time. Water users on the Musselshell have petitioned the Department to close the Musselshell River to additional appropriations of water. The petition was filed on April 23, 1984, under § 85-2-319, MCA. As yet the Department has not granted or denied the petition. However, the Department has proposed administrative rules² closing the river and its two

² Public hearings on the proposed rules have been set for late April of this year in Harlowtown and Roundup, Montana.

forks to further appropriations during July, August, and September.

The availability of water in the Musselshell has been declining since 1980 due to increased demand and a serious drought cycle. The water shortages in 1985 and 1988 were so acute that voluntary moratoriums on irrigation diversions were implemented in July to ensure adequate water for stock and municipal uses. The moratoriums lasted throughout the remainder of each year.

There are times in the vicinity of the proposed project when flow in the Musselshell is so low it cannot support stock or domestic use. Often the flow in the river by Roundup does not reach the area of the proposed diversion. (Department's records and testimony of Doug Parrott, Dale Stensvad, Thomas DeJaegher, and Sterling Sundheim)

10. Department analysis of the availability of unappropriated water in the Musselshell River shows unappropriated water is available 100% of the time in April and October. These figures reflect an assumption that demand for irrigation water will be very low in these months. However, this may not reflect the actual practices of the irrigators that rely on the Musselshell River. It may be their practice to saturate their fields early in the spring as a hedge against the likelihood of shortages later on in the irrigation season or to saturate their fields in the fall to hedge against the likelihood of shortages in the following year. In addition, the figures are based on estimated

irrigation demands in normal years and would be lower if factored for irrigation demands in dry years. (Department's file and testimony of Sterling Sundheim)

11. Many of the objectors testified to experiencing frequent shortages of water in the Musselshell River in April and May at their points of diversion. The objectors testified that their personal experience did not coincide with the projected water availability figures in the Department's analysis. The length of time objectors have had personal experience with irrigation from the Musselshell River ranged from 19 to 40 years. Gale Stensvad testified that over the last ten years the Musselshell River at his property has had its lowest flows in April because that is when Deadman's Basin Reservoir is filling and there is no return flow from irrigation. High flows are in June when runoff from the mountains reaches them. This was confirmed by Thomas DeJaegher, James Christensen, and Douglas Parrott. From 1985 through 1990 water users in this reach of the Musselshell River were only able to operate their irrigation systems in April and May because of water released from Deadman's Basin Reservoir. (Testimony of Gale Stensvad, Douglas Parrott, James Christensen, and Thomas DeJaegher)

12. All objectors testified the exceedance estimates for October in the Department's analysis coincided with their personal observations made over their years of experience as irrigators using Musselshell River water.

13. The reach of the Musselshell River around the Town of Melstone which includes the area of proposed point of diversion is the worst part of the basin in terms of water availability. It usually experiences water shortages first. (Testimony of Sterling Sundheim)

14. Applicants have provided stream flow records for the Musselshell River compiled by the United States Geological Survey from 1937 through 1986. In a letter dated March 13, 1991, Applicant compares the average stream flows to the total of all recorded water rights on Flatwillow Creek. The comparison shows that average flow in the Musselshell River from April 15 to June 1 exceed the water rights on Flatwillow Creek by 181.78 cubic feet per second. No analysis is given for the period from September 1 to October 15. There is no explanation of how this comparison proves that unappropriated water is available at the proposed point of diversion which is on the Musselshell River approximately 15 river miles upstream from Flatwillow Creek. The implication is that water rights downstream from the proposed appropriation will be satisfied by flows from Flatwillow Creek. Objectors Stensvad, DeJaegher, and Christensen, however, are all between the proposed project and Flatwillow Creek. (Department's file and records, testimony of Dale Stensvad, Thomas DeJaegher, and James Christensen)

15. Flows in the Musselshell River in 1991 were very good. There was a very good flow in the Musselshell at the proposed

point of diversion in 1991. (Testimony of Douglas Parrott and Dave Roberts)

16. Applicants have been able to pump from the Musselshell River onto a property across the river from the proposed project in four out of the last five Aprils. Nothing further was provided about whether flow exceeded demand in those Aprils and might have been available for additional appropriations, or whether all water rights were satisfied at the time Applicants were pumping. Furthermore, for three of the last five years the Delphia-Melstone Canal has been closed for repair work during the months of April and May. (Testimony of Dave Roberts)

CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter herein, and the parties hereto. Mont. Code Ann. Title 85, Chapter 2 (1989).

2. The Department gave proper notice of the hearing, and all relative substantive and procedural requirements of law or rule have been fulfilled; therefore, the matter is properly before the Hearing Examiner. See Findings of Fact 1, 2, and 3.

3. The Department must issue a Beneficial Water Use Permit if the applicant proves by substantial credible evidence that the following criteria set forth in § 85-2-311(1), MCA, are met:

- (a) there are unappropriated waters in the source of supply at the proposed point of diversion:
 - (i) at times when the water can be put to the use proposed by the applicant;
 - (ii) in the amount the applicant seeks to appropriate; and

(iii) during the period in which the applicant seeks to appropriate, the amount requested is reasonably available;

(b) the water rights of a prior appropriator will not be adversely affected;

(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(d) the proposed use of water is a beneficial use;

(e) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved; and

(f) the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

4. To meet the substantial credible evidence standard in § 85-2-311(1), MCA, the applicant must submit independent hydrologic or other evidence, including water supply data, field reports, and other information developed by the Department, the U.S. Geological Survey, or the U.S. Soil Conservation Service and other specific field studies, demonstrating that the criteria are met. Mont. Code Ann. § 85-2-311(4) (1989).

5. The proposed use of water, for irrigation purposes, is a beneficial use. Mont Code Ann. § 85-2-102(2)(a) (1989). The Department, however, must not issue a water use permit for more water than can be beneficially used. Mont. Code Ann. § 85-2-312(1) (1991). The proposed volume could not be beneficially used, and therefore cannot be permitted. See Findings of Fact 4, 6, 7, and 8. Applicants have not provided sufficient substantial evidence to identify the volume of water that would be beneficially used. See Findings of Fact 5 and 8. Therefore, Applicants have not met the criterion in § 85-2-311(1)(d), MCA.

6. The records provided by Applicants and the analysis done by the Department are not substantial enough to overcome the collective and uncontradicted testimony of the objectors. The testimony of the objectors is consistent. It establishes that the Musselshell River has a history of chronic shortages of water throughout the proposed period of appropriation in the immediate vicinity of the proposed point of diversion that continued through 1990. See Findings of Fact 9 and 11. It has also been established that the Musselshell River has complex and varying stream flow characteristics and conditions. See Findings of Fact 9 and 13. The records provided by Applicants and the analysis performed by the Department are not specific to the immediate vicinity of the proposed project. Furthermore, the analysis contains assumptions that, while sophisticated and scientifically sound, are general and fail to reflect some of the special characteristics of irrigation practices in the immediate vicinity of the proposed project. See Finding of Fact 10 and 14.

Because the water availability analysis is a projection for the entire length of the Musselshell River below Roundup, Montana, it must be weighed in context with whatever evidence is in the record about water availability in the specific vicinity of the proposed point of diversion. The testimony of the objectors indicated that water availability at their own points of diversion varied greatly from the flows projected by the Department's analysis. See Finding of Fact 11. Therefore it cannot be concluded solely on the basis of the results of the analysis that

unappropriated water is available at the proposed point of diversion in the amount Applicants are requesting throughout the proposed period of diversion.

A single good year cannot be the basis for a finding that unappropriated water is sufficiently available to satisfy a new appropriation. Applicants did not supply evidence that the flow at the proposed point of diversion in that good year was sufficient to satisfy rights other than his own, or that the flow in that April would be repeated in future Aprils regularly enough to satisfy the proposed appropriation. See Findings of Fact 15 and 16.

In light of the evidence of chronic water shortages in this reach of the source, and without substantial credible evidence showing with specificity that water is reasonably available in the amount requested at the proposed point of diversion during the proposed period of use, it is concluded that the criterion in 85-2-311(1)(a), MCA, is not met.

7. Since an applicant is required to show by substantial credible evidence that all the criteria necessary for the issuance of a permit have been met, and since Applicants in this matter failed to demonstrate that the volume of the proposed appropriation would be beneficially used and that there is unappropriated water in the source of supply at the proposed point of diversion during the proposed period of appropriation, no finding is necessary as to whether the water rights of prior appropriators would be adversely affected, whether the proposed

diversion works would be adequate, or whether the proposed use will interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved. See In re Application 53221-s400 by John E. and Betty J. Carney; In re Application 61333-s40A by Reuben C. Pitsch. In denying the Application at this point, the Hearing Examiner does not purport to have determined that the proposed appropriation could not be granted, given sufficient credible evidence of an adequate means of diversion and adequate plan of operational management.

PROPOSED ORDER

Application for Beneficial Water Use Permit No. 77304-s40C by Dave and Patricia A. Roberts is denied.


NOTICE

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner. The defaulted objectors are restricted to excepting to the default ruling. The Department will disregard any exceptions submitted by the defaulted objectors on other substantive issues.

Any exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Parties may file responses to any exception filed by another party within 20 days after service of the exception. However, no new evidence will be considered.

No final decision shall be made until after the expiration of the time period for filing exceptions, and due consideration of timely exceptions, responses, and briefs.

Dated this 24th day of March, 1992.


John E. Stults, Hearing Examiner
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6612

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record at their address or addresses this 25th day of March, 1992, as follows:

Dave & Patricia Roberts
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Melstone, MT 59054

DeJaegher Ranch
% Thomas DeJaegher
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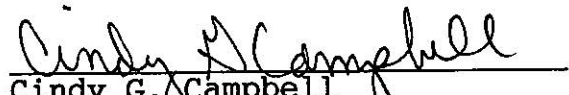
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